

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, WESTERN DIVISION
HONORABLE DAVID A. KATZ, JUDGE PRESIDING
(Hearing held in San Francisco Superior Court)
400 McAllister Street, San Francisco, California)

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IN RE:)	
)	
)	MDL Docket No. 1742
)	
)	Case No. A:10-MD-2197
DePUY ORTHOPAEDICS, INC., ASR HIP)	
IMPLANT PRODUCTS)	
)	
)	
)	
COORDINATION PROCEEDING)	
SPECIAL TITLE [Rule 1550(b)])	
)	State of California
)	JCCP NO. 4649
)	
DePUY ASR HIP SYSTEM CASES)	
)	
)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Tuesday, July 26, 2011

Reported by: Janet S. Pond, CSR #5292, CRR
Official Reporter

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P R O C E E D I N G S

Tuesday, July 26, 2011 - 1:55 p.m.

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(The following proceedings were held before **Judge Richard A. Kramer** and **Judge David A. Katz** in Department 304 of the San Francisco Superior Court, 400 McAllister Street, San Francisco, California:)

THE CLERK: Calling the matter of DePuy ASR Hip System Cases, JCCP 4649.

Also calling the matter of In Re DePuy Orthopaedics Incorporated ASR Hip Products Liability Litigation, Case Number 10 CU 2197.

JUDGE KRAMER: Welcome, everybody. Thank you for all for coming, I know, from near and far. Appreciate that.

This is a dual hearing. It's in the federal MDL case as well as the state case that I preside over. We are not going to clearly distinguish --

(Interruption on CourtCall.)

JUDGE KRAMER: We're not going to clearly differentiate between the cases. I'm going to start off with some important messages as well as some administrative matters, and then those in the federal case, we'll deal with that, but we'll be generating one transcript from all of this.

Those of you who are on the phone and are using your speaker phones, when you breathe, even slightly harder than normal, it sounds like heavy breathing for reasons that we will not be able to ascertain and it is distracting, so please pick up your handsets and work that way. We would appreciate it. Thank you.

1 All right. Let me start with a report that is ripped from
2 the headlines, as they say, on television, that is, that the
3 San Francisco Superior Court is in dire financial condition.
4 Those of you who are interested in this court have read about
5 this in the newspaper.

6 The genesis of this is that there was an unallocated, very
7 large budget cut applicable to the courts that was passed in the
8 budget that the Legislature passed and the Governor signed.
9 "Unallocated" means it was just \$150 million without being
10 related to any specific activity or line item, and it was left
11 to the courts, as a recipient of budget money, to figure out
12 where the burden for this reduction falls.

13 In anticipation of what would be San Francisco's burden,
14 there was an announcement by our presiding judge a little over a
15 week ago to the effect that if San Francisco were to bear the
16 burden that one would expect, then the result would be
17 essentially to shut down our civil court system.

18 Would you like to get some water?

19 **MS. RELKIN:** I have some, thank you. I'm so sorry.

20 **JUDGE KRAMER:** We're still getting some background noise on
21 the CourtCall, so if anybody can mute your phone, we would
22 appreciate that as well. Don't forget to turn it back on if you
23 wish to speak. Thank you.

24 In any event, the announcement by our presiding judge was
25 that the result would be all but three civil courtrooms would be
26 closed, and the three that would be open would be handling
27 unlawful detainers, five-year statutes -- and those of you from
28 elsewhere, that is a time within which cases have to be brought

1 to trial, five years from filing, but there are many exceptions
2 to that -- and preference cases, which would be statutorily
3 authorized preferences for trials, elderly people, sick people
4 and the like.

5 The impact would be essentially no civil cases except those
6 exceptions would go out to trial.

7 In addition, our law and motion departments, there are two
8 of them presently, would be combined into one, effectively
9 giving the surviving judge twice the work. And then the judges
10 in the closed departments would be given various assignments.

11 Part of the plan was to terminate all of the court
12 commissioners. The analogue in federal court is a magistrate
13 judge although the magistrate judges get more trial authority
14 than our commissioners.

15 But in any event, those functions are such things as traffic
16 court, special hearings in probate, special hearings in family
17 law and the like, and the judges whose civil departments would
18 be closed would fill those functions.

19 The remaining judges, and you can't fire judges under
20 California law because we are statutorily created officers, the
21 other judges would do something.

22 Most importantly, the two complex litigation departments
23 would be closed effective September 30, and all of the cases in
24 complex litigation departments would not be assigned elsewhere
25 but would simply go, as I metaphorically put it, in a large box.
26 To the extent anybody in the former complex litigation case
27 wanted to get a matter resolved, it would be without the ongoing
28 supervision that we have now, and it would be into law and

1 motion, which then would be much more burdened than I described
2 earlier.

3 That was the plan that was announced. There was a meeting
4 last Friday whereby the State Judicial Council, a
5 constitutionally created body that is in charge of making the
6 ultimate decision on the allocations, determined what it was
7 going to do, and what it did was essentially what our presiding
8 judge anticipated when she gave the doomsday scenario that I've
9 described for you.

10 That is the present status of the matter.

11 All right. So most importantly, what does that mean for
12 you? Unless things change, then this case, along with all the
13 rest of my cases, and this case is a Judicial Council
14 coordinated proceeding even though there are many, many, many
15 individual cases, would in the usual course simply be no longer
16 a complex litigation case, and you would be as if you were a
17 regular case in the bullpen of all the cases here.

18 What I'm doing between now and September 30, besides -- I
19 can't say that I'm praying because the Church and State must be
20 separated here, but besides hoping for better than what I'm
21 describing for you, I believe it is my responsibility to take
22 every one of my cases and put each of them in a position so that
23 whatever happens with them there will be a battle plan, a way to
24 go forward.

25 As to the JCCP cases, that is, for those of you not
26 familiar, cases that are coordinated from different parts of the
27 state like what we have here, I have in mind, if it turns out
28 that nothing happens to ameliorate the situation, I have in mind

1 to discuss this directly with either the Judicial Council
2 administrator of such cases or, more likely, the head of the
3 Judicial Council, who is the Chief Justice of California, and to
4 request that the case be assigned elsewhere, a different county.

5 Those of you that participated in our festivities where we
6 talked about whether this case should be coordinated in
7 Los Angeles versus San Francisco will not be allowed to tell me
8 "I told you so," at least if you had suggested that Los Angeles
9 would be a proper place for this.

10 I had no idea that anything like this would happen at the
11 time we made the decision to have this in San Francisco. As a
12 matter of fact, I still am having trouble grasping the
13 significance of all of this even though of course I recognize
14 that this is all what's going on.

15 But to the extent I can move a case, coordinated cases, or
16 something like that, to another place that has a complex
17 litigation department, and therefore a single assignment judge,
18 I will do that.

19 I'm going to do that later rather than sooner because I
20 don't want to start wheels rolling if it turns out we don't have
21 to do that.

22 Meanwhile, I want to put in place, as I said, mechanisms
23 that keeps things organized and allows things, if they're going
24 to be transferred, to be transferred in an organized fashion,
25 and have the litigants working pursuant to that organization so
26 that you'll not only make use of the time between now and when
27 it gets transferred, if it does, but you'll be able to go to the
28 new judge and say, well, here's what we're doing and it seems to

1 make sense, and perhaps if it's working well, then make it much
2 easier for a new judge to step in and replace me.

3 That's what's going on. Does anybody have any questions?

4 **MR. KELLY:** Your Honor, actually I don't have a question,
5 but I think before we presume that the Court's going to close,
6 it's worth telling you that I was at a meeting this morning with
7 Judge Feinstein along with some lawyers in this room who
8 represent these parties, as well as some other bar leaders, and
9 I am not convinced that the sky will fall on September 30.

10 I think not just in this courtroom, but in other courtrooms,
11 people would much rather have you keep this case, even the
12 people from Los Angeles who won't admit it, and I think we ought
13 to keep working towards the assumption that we're going to keep
14 this department open and get cases to trial here in California.

15 **JUDGE KRAMER:** Did you say, "who won't admit it." You meant
16 won't admit they're from Los Angeles, as opposed to --

17 **MR. KELLY:** We know who they are.

18 **MR. O'CALLAHAN:** Not me, I'm not.

19 **JUDGE KRAMER:** We weren't looking at you.

20 I mean, you're right. There are things that can happen.
21 There are conceptual as well as practical ways around this.
22 Nonetheless, I have to plan for the worst, and what that means
23 is I have to try to get you well organized, and if you're going
24 to be sent somewhere else, organized in a fashion that would
25 have a pretty good shot at continuing it. Not where you'll all
26 say, gee, we sure miss Judge Kramer. Wasn't that sad?

27 **MR. KELLY:** Well, it would be sad, but we could also just
28 set all the cases for trial in the next 45 days before

1 September 30th.

2 **JUDGE KRAMER:** You know, it's funny you should say that
3 because that's exactly what I'm going to do next. That's the
4 good news. The bad news is they're going to be in
5 Crescent City, the northernmost part of California just before
6 Oregon.

7 All right. Any other comments or questions?

8 It's an unprecedented situation. Creativity is welcome. If
9 you can think of something or if you need more information from
10 me or the court system, feel free. Any one of us who's been
11 involved with the court system, and for me it's for 40 years, is
12 just overwhelmingly shocked by this, but that's not helpful
13 emotion. We have to be rational and plan. So whatever it is
14 you think you can do, do it. And that's about all I can say.

15 Questions?

16 Anything you want to say, for starters?

17 **JUDGE KATZ:** Good luck.

18 **JUDGE KRAMER:** All right. What I have in mind is to go
19 through the case management conference orders that you have in
20 mind here, make sure they're finalized, sign whatever I can,
21 come up with a plan that is similar to other plans that all of
22 you who do these cases are used to, and all of you who have
23 appeared in this court and almost certainly in Judge Katz's
24 court have come to expect as a reasonable way of doing things.

25 I got to ask this: Is that the great seal of the
26 United States on that cast? Don't stand up.

27 **MS. SHARKO:** No. It is the seal of the U.S. Navy because my
28 oldest son received his wings as a Navy pilot last week and so

1 he put it on my cast.

2 **JUDGE KRAMER:** Congratulations to you.

3 (Applause.)

4 **JUDGE KRAMER:** All right. There was also a meeting of one
5 of your many committees during the lunch hour. I did not have
6 the full benefit of what happened there so if we need to plug
7 anything in, I think what we ought to be thinking about is, from
8 my perspective, getting the orders in the JCCP case finalized or
9 figure out how to finalize them and then get them in place.

10 To the extent we can duplicate that in the MDL case or
11 modify it in a way that's helpful in the MDL case, then we
12 should do that.

13 Generically, here's what I think we need. We need to know:

14 One, who is in charge, because all of you can't be in
15 charge.

16 Two, what is the responsibility of those who are in charge
17 and what is not the responsibility of those who are in charge?

18 Three, how do we start the flow of information going so that
19 case analysis and hopefully the invisible hand can show up
20 sooner rather than later and so that formal discovery does not
21 have to be used except as necessary, thereby saving lots of time
22 and lots of money. This has to do with the exchange of
23 routinized information; fact sheets, as you people call them.

24 Next, to figure out how to do case-specific discovery that
25 would supplement the routinized exchange of information and may
26 or may not require formalized discovery.

27 And, next, is to figure out how to coordinate the activities
28 in the state court in California and the MDL proceeding.

1 That's not really a "next" in the sense of a sequencing.
2 That's something we should be thinking about at every stage.

3 And there was another one, and for the life of me, I can't
4 figure it out.

5 Oh, yeah, figure out how, if cases are going to go to trial.
6 I knew there was another one.

7 All right. So anybody have another agenda item that you
8 want to stick on there, or comment on mine?

9 **MR. ZELLERS:** No, Your Honor. Michael Zellers. We've gone
10 through a lot of these with you. I know our colleagues from the
11 MDL have worked on those orders as well.

12 As of the last time, yes, that we were together, we do have
13 in place an appointment of counsel. We've set out the
14 responsibilities of counsel in terms of the flow of information
15 in the MDL first, and then in California we've agreed to a
16 preliminary disclosure statement which starts the flow of
17 information.

18 Ms. Sharko, Mr. Kelly, and I guess Mr. London can report to
19 you on the status of our negotiation with the plaintiff fact
20 sheet and the defense fact sheet. I think we've made
21 substantial progress with respect to those, and our vision is
22 that we have a common plaintiff fact sheet and defendant fact
23 sheet to be used in both the MDL and in the state court
24 litigations.

25 **JUDGE KRAMER:** As I recall, on that point, last time we
26 discussed there might be some California specific issues that we
27 would put at the end of the fact sheet with a specification that
28 the following applies only to California. Is that what you

1 ended up doing?

2 **MS. SHARKO:** No, sir. I am happy to report that we have
3 agreed on one form to be used in all three jurisdictions. There
4 are three open issues that we're still meeting and conferring
5 on. I think we need a little bit more time on those three
6 issues.

7 If we cannot resolve those issues forthwith, then I think
8 they are probably ripe for the judges to rule on them, and I
9 would expect that could happen real quickly. I would like to
10 take one more pass at meeting with Mr. Kelly and Mr. London on
11 those three issues, but they are not California specific.
12 Everything California specific has been resolved.

13 **MR. KELLY:** Michael Kelly for the plaintiffs in the
14 California action. I'm not sure that's quite right. There has
15 been uniform agreement on about 97 percent of the stuff in these
16 forms, but I'm not sure that on those particular questions where
17 there remains disagreement, that there is not a different result
18 that may obtain in California under California law than under
19 the federal law.

20 So ultimately I don't have any problem with a so-called
21 routinized form, but would not want to get a routine result just
22 for the sake of getting that on those three questions.

23 You know, I think we can pass to the end the question of how
24 we deal with those areas of disagreement. I have had, by my
25 last count, nine long conversations with Ms. Sharko and
26 Mr. London, and if we want to try to hammer at it some more, we
27 can do that. Only thing is, for the sake of uniformity, I'm not
28 prepared to say that we would ignore what the controlling law in

1 California would be.

2 **JUDGE KATZ:** Well, I don't think it's the issue of
3 uniformity at all. If you agree to disagree on issues which are
4 particularized to California, fine; then I am certain that the
5 judge sitting to my immediate right will resolve that.

6 If there are broader issues such as Ms. Sharko discussed in
7 our previous meeting in the MDL this morning, then if those
8 cannot be resolved, I have discussed those also with
9 Judge Kramer, and they will come before me and I will confer
10 with him.

11 We would, as judges generally do, prefer that the results of
12 meet and confer are uniformity as to your agreement on what is
13 to appear on those fact sheets. Until the time you tell us that
14 there cannot be agreement on Item 1, 2 or 3, or whatever
15 combination, then it won't come to us.

16 When you tell us that, it will come to us.

17 **MR. KELLY:** Yes, Your Honor. These areas that Ms. Sharko
18 identified, I wasn't there, but although they may be broad
19 areas, those are the areas, and I'm suggesting that there well
20 may be a different decision based upon California law.

21 **JUDGE KATZ:** I understand that. I understand that.

22 **JUDGE KRAMER:** Well, as to that, I suggest every plaintiffs'
23 counsel begin filling out the form minus the three questions so
24 that you're generating the facts as quickly as possible.

25 **MR. KELLY:** And I would say we have uniform party agreement
26 on that.

27 **JUDGE KRAMER:** Party agreement, okay. You could even turn
28 it over with -- if we're having hearings on resolving the three

1 questions and you're ready to turn the information over, it
2 should happen as quickly as possible, and the facts regarding
3 each plaintiff situation, the common areas, should not be held
4 hostage on the other matters which, as I understand them, deal
5 with slightly different concepts.

6 **MR. KELLY:** And, Your Honor, if the agreement was to kick
7 those on down the road six months and answer the rest of the
8 sheet, I think that's fine.

9 **JUDGE KRAMER:** Not six months.

10 **MR. KELLY:** Six hours.

11 **JUDGE KRAMER:** Now you're talking.

12 **MR. KELLY:** Somewhere in between.

13 **MS. SHARKO:** I would suggest that you give us until the end
14 of the week to reach agreement on the three issues. If we
15 cannot reach agreement by the end of the week, then on, say,
16 Tuesday or Wednesday, the defense will submit a brief on the
17 questions, and then plaintiffs can submit a brief in the time
18 they need, and then Your Honors can rule.

19 **JUDGE KATZ:** I think, going through an agenda at this
20 juncture, I just told Judge Kramer, we'll probably address both
21 the MDL and California issues because the way we've done it in
22 the past is to have it presented, have input from MDL counsel,
23 and then input from -- in this case California counsel,
24 plaintiff or defendant, and put it on before the room.

25 Let's go with Item 1, which is a overview report on MDL
26 cases. Mr. Tucker.

27 **MR. TUCKER:** Bob Tucker. Your Honors, so if I'm going to
28 give a report on the MDL. I have to start with the very strong

1 admonition that Judge Katz gave to the plaintiffs' steering
2 committee, the plaintiff executive committee and defense counsel
3 at the very outset, which was that we were not supposed to waste
4 time. That this was to be an MDL that was to get things done,
5 it was to be efficient, it was to be nimble, and we were to get
6 orders in place so that they were in place to get things moving
7 in the MDL, and they would be in place so that they could be
8 cooperatively passed along to the state court judges who had
9 cases.

10 And so what we have spent the last three or four months
11 doing is getting in place a protective order which is now in
12 place here in California as well, in a California-ized fashion;

13 Get in place a short form complaint procedure in the MDL to
14 permit people to file their complaints in the MDL;

15 To get in place an explant preservation order so that
16 patients who were having revision surgery that wanted their
17 explants to be examined by experts, whether on the plaintiff
18 side or the defense side, we had a consistent procedure that
19 would be in place for the explants to be evaluated and so that
20 people, when they were looking at the results of this testing,
21 wouldn't be criticizing the protocols being followed for the
22 explant revisions.

23 Now, Judge Kramer, Mr. Kelly and I have now agreed upon a
24 California styled preservation order which tracks along the MDL
25 preservation order with some -- a few differences consistent
26 with California law in terms of disclosure of information.

27 So that order is prepared for the Court, to be presented to
28 the Court for entry here in the JCCP.

1 Is that correct?

2 **MR. KELLY:** Agreed.

3 **MR. TUCKER:** So we've got that in place, and that's an
4 important -- a very, very important order because we've got --
5 we've got this evidence that is sitting in hospitals all over
6 the state of California, sitting in hospitals all over the
7 country, and they have to make their way from those hospital
8 pathology departments or surgical suites to the various places
9 that the plaintiffs' lawyers want them to go, and you can see
10 how many plaintiffs' lawyers there are here. They all want them
11 to go someplace unique for them, for their clients, or to the
12 Orthopaedic Hospital at UCLA where DePuy has set up a retrieval
13 lab.

14 So this preservation order is in place and it's working.
15 There are issues that come up every day with lawyers in this
16 room, and we're working with people to make sure that anybody
17 that's having any difficulties are getting them resolved.

18 **JUDGE KRAMER:** You say it's in place. I haven't signed it
19 yet, right?

20 **MR. TUCKER:** It's in place in the MDL and it has been agreed
21 to but not signed by the Court, by Your Honor.

22 **JUDGE KRAMER:** Do you want to give it to me right now and
23 I'll sign it?

24 **JUDGE KATZ:** I do want to elaborate just a tiny bit. I've
25 learned over the last six years not to elaborate too much on
26 what Mr. Sharko or Mr. Tucker, or those sitting at the front
27 table on plaintiffs' side do because they usually cover the
28 waterfront.

1 But to show you about the intent that we've had in the MDL
2 and how we've addressed that intent of moving things along, I
3 got a call in December about accepting the assignment. I
4 accepted it.

5 We interviewed roughly 100 people in January, and in
6 early -- relatively early, first half of February, had the first
7 meeting of MDL leadership, both plaintiffs and defendants.

8 Since then, these orders have been developed. We've had a
9 meeting like this on June 1 with state court Judge Martinotti in
10 New Jersey. And we intend, I intend, and Judge Kramer and I of
11 course have discussed this, talk about cooperation, not
12 necessarily coordination, because we are independent courts, but
13 cooperation.

14 And why I've stressed cooperation as a requirement for both
15 the plaintiffs' leadership of the MDL and defense counsel, and
16 since I have had experience with much of leadership in a prior
17 but still winding down MDL case involving the Ortho Evra birth
18 control patch, I was convinced that these folks would act in
19 that manner, and thus far, that has been the badge of this group
20 of your leadership.

21 I wanted to get that in front of you so you understand that
22 in less than six months these things have gotten rolling. Now
23 that they're in place, you'll hear in a few moments about the
24 status of discovery and production and review.

25 Sorry. Just I wanted to get that out.

26 **MR. TUCKER:** So I encourage anybody who has patients who are
27 being revised and you're having any difficulties with the
28 hospitals or the administrative people at the hospitals with

1 respect to explants, just let us know and we can reach out and
2 try to help do that.

3 A lot of plaintiffs are choosing to have their clients'
4 explants sent to Orthopaedic Hospital, to DePuy, under the MDL
5 order, and that's fine. We'll help facilitate that.

6 To the extent that you want to send it to your own expert or
7 storage facility, that's fine with us as well, as long as the
8 protocol that has been attached to the MDL Preservation Order
9 and now the -- it's the same protocol which has now been
10 appended to the JCCP Preservation Order is followed, and that's
11 basically that this is an inspect and test but no destructive
12 testing of the explants.

13 So that system seems to be working pretty well.

14 The other very important achievement or accomplishment in
15 the MDL is the ESI Production Format Order which was a predicate
16 to being able to produce our documents. From the very first
17 time I stood up in the MDL, I said, we want to produce
18 documents. We want to get the documents out. We want to
19 produce them in the MDL, and we want to make sure that they're
20 made available in California, we want to make sure they're
21 available in New Jersey, we want to make sure that they're
22 available to counsel who have filed the cases. We don't want to
23 be duplicating our production efforts. We want to get the
24 documents out.

25 So there was a significant component in the MDL of the
26 negotiating team on the production format for the electronically
27 stored information. California lawyers were very active in that
28 negotiation.

1 That order was entered in the MDL. It has been -- I think
2 it has been entered here in California. But I don't see it as
3 being entered here, but we are, Your Honor, committed to making
4 the documents that are produced in the MDL available and usable
5 here for counsel in California.

6 Now, in terms of where we are; so we have agreed upon the
7 production format. We have now had three productions of
8 documents in the MDL. Total of 2.5 million pages of documents
9 have been produced already. 1.7 million pages were produced, I
10 think last Thursday or Friday. I'm told by a number of the
11 plaintiffs' lawyers they've already reviewed them all and so
12 they're waiting for our next group. But every 30 days we are
13 going to produce around a million pages, little bit better than
14 that, with the expectation sometime this fall we will be through
15 this production.

16 We are in the course of completing another sweep of the
17 company. We have produced the documents, all or some of the
18 documents for 85 custodians, and, again, the intent is to
19 produce them in the MDL and then make sure they're available for
20 the California lawyers so that there doesn't need to be
21 duplication on production.

22 **JUDGE KATZ:** You should know, those of you who are
23 involved -- with both the MDL and California, that thus far
24 there are, as of this morning, 1424 cases which have been filed
25 in the MDL; 662 in California as of last Friday; 59 in
26 New Jersey. The total number of state court cases across the
27 states of which we have become aware are 763.

28 You must put that in context of the number of these implants

1 over the past years, and so that 2200 represents a fraction of
2 the total, and that's why some things will need to develop as
3 the numerosity of cases becomes clear, the number that we --
4 that end line.

5 Steve?

6 **MR. SIKOS:** I've had nightmares about this moment.

7 We have had a long standing discussion over many mass torts
8 about the ability to cooperate between state and federal courts,
9 and as both Your Honors know, I've been before both of you for
10 awhile, and this litigation might be a very good example of how
11 state-federal cooperation can work, and we've already reached
12 agreements after listening, I think it was at Judge Kramer's
13 cookie lunch we had a list of -- I haven't described that yet --
14 a list of items that Judge Kramer wanted to address which are
15 similar in scope to what Your Honor, Judge Katz, wanted to
16 address.

17 So we worked to put together an agreement with the consent
18 of Mike Kelly, who is our lead in California, and with the MDL,
19 and I think there are certain things that we can say that are
20 hopefully very positive.

21 The first is that we recognize that both the MDL and
22 California are separate and independent jurisdictions, and I've
23 long asked for the jurisdiction paragraph to be placed in
24 Judge Kramer's orders, which we have here, which recognizes that
25 California is separate, we're independent, we have the right to
26 conduct our own discovery, and it's actually in CMO 1 here.

27 But we also recognize that we have an obligation to
28 communicate and cooperate on behalf of both the MDL and

1 California. And so this litigation is marked by agreements that
2 might be useful in future litigations.

3 For example, the parties have agreed that the documents
4 produced in the MDL are deemed produced in California; that the
5 documents are not work product, the documents themselves, and
6 that all lawyers should have access to the documents that are
7 produced.

8 We have agreed that the documents produced in California
9 state court would be deemed produced in the MDL and that the
10 right to conduct discovery in both jurisdictions exists, which
11 has been disputed in other cases, but not this one.

12 We've agreed that the propounding of discovery and the right
13 to hear motions -- there have been cases in the past where some
14 have argued that one judge abdicates their jurisdiction to
15 another, and this case is one in which the parties very much
16 want communication and cooperation but recognize each other's,
17 that we have separate and independent jurisdictions.

18 And so I think in terms of the state-federal cooperation, we
19 have reached a point in mass torts that hopefully there's a good
20 balance. And I want to add that after yesterday's cookie lunch,
21 the group of lawyers in San Francisco did go out and meet and
22 did come up with a plan, and thanks to Matt Davis, did set up
23 certain meetings to try to come up with creative solutions.

24 I would be remiss in not saying at this hearing that what I
25 said at the Reglan hearing, which is that we have had tremendous
26 success with this Court here in California and in other JCCPs in
27 planning this litigation without undue delay.

28 And we here in California have done -- especially here in

1 San Francisco, are really going to work hard to find a creative
2 solution to keep this. It's taken us years to come up with this
3 model of state-federal cooperation and get rid of the word
4 coordination. And now that we're here, we would like to stay
5 here.

6 **JUDGE KATZ:** Mr. Kelly, do you have anything you wish to add
7 to Steve from the California perspective?

8 **MR. KELLY:** You know, I just cannot follow Steve,
9 Your Honor. Thank God he said it accurately.

10 **JUDGE KATZ:** Okay. A couple of things.

11 I don't know what the implications of the first may be, but
12 I've discovered, since coming on the bench a little while ago
13 with Judge Kramer, that both he and I are left-handed. That may
14 have serious implications for you attorneys.

15 I will apologize in advance of being extremely far behind
16 Judge Kramer in the provision of goodies through cookies, cakes,
17 et cetera. I'll try and catch up.

18 **JUDGE KRAMER:** That being a left handed compliment.

19 (Laughter.)

20 **JUDGE KATZ:** And, Ellen, you had an overview on, either of
21 you, on Item Number 2?

22 **MS. SHARKO:** Actually, I think Item Number 2, state court
23 report, was mine.

24 **JUDGE KATZ:** Oh, that's you. I'm sorry.

25 **MS. SHARKO:** That's okay. As you know, we have the
26 coordinated proceeding in New Jersey, New Jersey is still
27 working on the protective order, and we have our next New Jersey
28 conference with Judge Martinotti on August 8. We expect that

1 there will be a coordinated proceeding in Illinois, and the
2 first case management conference will be at the end of the week.

3 We have individual cases or groups of cases in about a dozen
4 other state court jurisdictions. Those state courts are running
5 behind California and MDL at this point, frankly. As protective
6 orders are entered in those state court cases, we produce the
7 MDL and California documents in those cases, and we will
8 continue to do that.

9 In a couple cases in state court, we have begun to produce
10 distributor documents and we're working on a process to make all
11 of those distributor documents accessible and produced as part
12 of the routine with the MDL and California documents. So the
13 MDL lawyers and the California lawyers and the New Jersey
14 lawyers, once they sign the protective order, will have access
15 to all of those distributor documents.

16 A couple of the state court lawyers wanted to move ahead
17 with depositions even though they did not have documents or
18 written discovery. We have had a couple company -- one company
19 witness and two distributor depositions which have been taken.
20 We've given notice of those proceedings to the leadership in
21 California, New Jersey and the MDL.

22 As those depositions continue, we will continue to give
23 advance notice of the depositions to the leadership in the three
24 jurisdictions. We have elected not to cross notice for the time
25 being because it's early in the litigation, but everybody should
26 work cooperatively there.

27 That's the state court report.

28 **JUDGE KATZ:** I'd like to interject a couple things.

1 I have received telephone calls from a number of state court
2 judges over the past couple of weeks, some a little longer;
3 Maryland, Georgia, Illinois, Wisconsin, that come off the top of
4 my head. And in each case, I've had my senior permanent
5 life-long, as a judge, law clerk, Cathy Garcia Feehan, who many
6 of you are acquainted with, e-mail or fax them copies of all
7 orders that we have issued in the MDL, and anything else which
8 we think may be of assistance to them in getting their arms
9 around what, in many instances, are still new cases before them.

10 And so that feeling of cooperation seems to be emanating
11 from both sides of the state-federal separation.

12 Anything further on state court matters from either defense
13 or plaintiff?

14 (No response.)

15 **JUDGE KATZ:** Any additional input with regard to document
16 discovery and coordination?

17 Okay. We've also already discussed on my agenda the PFS and
18 the DFS and the efforts which have and will be ongoing to
19 resolve the remaining issues with regard to finalizing those two
20 documents. If they cannot be finalized, I would presume those
21 briefs will be forthcoming in the next days.

22 Case-specific discovery, which was already mentioned by
23 Judge Kramer.

24 Ms. Relkin.

25 **MS. RELKIN:** Good afternoon. Ellen Relkin from Weitz &
26 Luxenberg, for the plaintiffs in the MDL.

27 Since the scheme in the MDL, and until such time as there's
28 a bellwether selection, and we're not there yet, for sure, we

1 have certain clients, or heard from different lawyers, who have
2 medical issues. Some may be terminal, clients or certain
3 witnesses. This is the rarity, but there are certain isolated
4 instances where a client or their spouse or the surgeon is very
5 ill.

6 So we've set up a system, worked out with defendants, to
7 have a CMO which enables depositions of these in extremis
8 witnesses. So it's a basic system of identifying, noticing up
9 the deposition; at first will be a discovery deposition followed
10 by a preservation deposition so that witness testimony is
11 preserved in the unfortunate event they pass away before there's
12 a trial or -- that their evidence is preserved for further
13 litigation.

14 So we'll present it to the Court. Unfortunately, the copy I
15 have here which is printed out has the red lines. We can e-mail
16 it to Your Honor for entering.

17 **JUDGE KATZ:** That would be good.

18 **MS. RELKIN:** I don't think it necessarily applies to
19 California. It may. Anyway --

20 **JUDGE KATZ:** People live forever in California.

21 **JUDGE KRAMER:** We certainly have the incentive for doing so.

22 **JUDGE KATZ:** Do you have anything else on that, Bob?

23 **MR. TUCKER:** No.

24 **JUDGE KATZ:** Next, what remains on the agenda that we should
25 discuss at this juncture? Ellen?

26 **MS. RELKIN:** It kind of relates to the document discovery.
27 The MDL discovery committee had noticed some
28 30(b)(6) depositions so we've conferred with defendants and we

1 don't have the precise date, but in September we will have two
2 30(b)(6) depositions for the ESI witness designee and one for a
3 corporate organizational witness. So we're working together to
4 get that date set.

5 **JUDGE KATZ:** All right.

6 **MS. RELKIN:** I assume it may be cross noticed.

7 **MR. TUCKER:** Yes, we would intend that deposition to apply
8 both in the MDL and in California. There's no reason to take
9 that deposition twice.

10 **JUDGE KATZ:** I would think so.

11 Maybe it's time to interject why we, as judges, are so
12 concerned about cooperation.

13 These cases, particularly in the discovery and expert
14 witness portions of the cases, are extremely expensive to pursue
15 from both plaintiffs' and defendants' standpoint.

16 We are very cognizant of this, and the more that can be done
17 on a cooperative basis and the sharing that you've heard quite a
18 bit about over the last 45 minutes, the less expensive the
19 litigation becomes.

20 I have found that true, and I'm sure Judge Kramer has as
21 well, in handling previous mass tort issues or class action
22 issues, et cetera. And so those are a part of the reason also,
23 from the timeliness standpoint, as both Mr. Skikos and
24 Mr. Tucker articulated.

25 Doing it in -- in a cooperative basis such as has been
26 outlined will, if not speed up, maybe quicken up the process and
27 get toward the end line of resolution in a more efficient,
28 effective, cost-effective manner.

1 Judge Kramer had raised an issue with me on the telephone
2 last week about science day, my perspective. And I always
3 reserve the right to be wrong, except at home.

4 If science day presentations, presentation or presentations,
5 do in the course of events become necessary and appropriate, we
6 will do three things if that is held in the MDL:

7 One, we will, as we have in the past, video that process,
8 that science day presentation.

9 Two, we will provide state court judges who cannot attend in
10 person with a DVD -- is that the right term?

11 **JUDGE KRAMER:** A round thing.

12 **JUDGE KATZ:** We used to call them recordings, of that
13 hearing.

14 And, third, we will provide a transcript to those state
15 court judges who wish to have that transcript.

16 In discussing the matter this morning with the MDL
17 leadership, I indicated that it was my present intent to attempt
18 to arrange a central location for any such science day so as to
19 reduce the cost of attendance, travel, hotels -- and I know you
20 folks all eat at McDonald's when you're at these ventures --
21 reduce the cost for the individual attorney.

22 And we'll be down the road with that, but if anyone else
23 wishes to weigh in on that particular item, I welcome it at this
24 time.

25 Okay. Other issues for -- Steve?

26 Go ahead.

27 **MR. KELLY:** No, I was asking him something about the agenda.
28 I got it answered.

1 **JUDGE KATZ:** Oh, okay. And I didn't mean to be rude. If it
2 was something that you wanted to present, let's go ahead and do
3 it.

4 **MR. KELLY:** (Shakes head.)

5 **JUDGE KATZ:** Okay. Anything else for open discussion here
6 by the plaintiffs MDL leadership?

7 **MR. SKIKOS:** Well, yes.

8 **JUDGE KATZ:** Or California leadership?

9 **MR. SKIKOS:** There's a couple more agreements that we
10 reached that are on --

11 **JUDGE KATZ:** We like the use of the term "agreements."

12 **MR. SKIKOS:** I really do.

13 **JUDGE KATZ:** We like it.

14 **MR. SKIKOS:** There was an agenda item relating to
15 dispositive motions that the parties have agreed is premature.
16 We also agreed, and I forgot how to phrase it so Mr. Tucker will
17 fix it, but we agree that the science day discussion will be
18 deferred as we continue to learn now about the patients revision
19 rates and recovery issues.

20 And then we have arranged a Greek chorus for -- inside
21 California joke -- with Mr. Robinson and Mr. Kelly to sing about
22 trial selection.

23 **JUDGE KATZ:** When and where?

24 **MR. SKIKOS:** That will be tonight at 5:00 o'clock.

25 But other than that, I think we have managed to come to as
26 many agreements as we can on those issues that Judge Kramer put
27 on his agenda and you had on yours.

28 **JUDGE KATZ:** Very good.

1 Anything further? Mr. Kelly, please.

2 **MR. KELLY:** I'm a very cooperative guy, it's in my nature,
3 Your Honor. And I just wanted to say if you should hear from
4 Ms. Sharko or Mr. Tucker that I'm not being understood, and that
5 that style is not being cooperative, I'm telling you in advance
6 that I was cooperative.

7 **JUDGE KATZ:** Are you impugning the integrity of Ms. Sharko?

8 **MR. KELLY:** I am not. These are wonderful human beings and
9 I've told them that off the record.

10 So that's number one. Number two, as a native-born
11 life-long, still residing in San Francisco San Franciscan,
12 welcome.

13 **JUDGE KATZ:** Thank you.

14 **MR. KELLY:** Having said that, I just wanted to make clear
15 that I think there are some things where we may get to forks in
16 the road where the California procedure and law doesn't apply,
17 and it's not out of any sense of not wanting to cooperate that
18 you find some resistance here.

19 We appreciate what has gone on in the MDL, and we like to
20 think that we may be able to do some things in California that
21 will be of assistance to you in Ohio in getting the federal
22 cases moving.

23 And then with respect to our JCCP today to Judge Kramer, we
24 had some things on the agenda, Your Honor, that dealt with
25 potential issues, including talking about case-specific
26 discovery and trial selection and whatnot, and I'm wondering,
27 since we have run late today, if it makes sense to set another
28 one of the JCCP hearings relatively soon -- I think most of the

1 lawyers in this courtroom are here for the MDL -- to talk about
2 those issues peculiar to California in the context of our
3 efforts, and not just our efforts, but the efforts of lawyers
4 statewide to avert this funding problem.

5 **JUDGE KRAMER:** We are going to set another case management
6 conference.

7 **JUDGE KATZ:** Mr. Kelly, I want to hasten to thank you for
8 what you just said with regard to this cooperation and
9 leadership, and that's why I'm here, because I think that it is
10 so important because, as in my past case, the California
11 component is very important because of the numerosity of state
12 cases in California in particular.

13 And so your and your compatriots of leadership and the
14 individual lawyers' input can be of significant benefit to the
15 MDL leadership and lawyers and to this judge. And that's why
16 I'm here, and I thank you.

17 Anything that you want to respond to Mr. Kelly?

18 **MR. TUCKER:** I can't compete with his graciousness,
19 Your Honor. So, no, I have nothing further.

20 **JUDGE KATZ:** Anything else from anybody involved in the MDL,
21 including any questions or input from counsel in attendance?
22 And, if so, please identify yourself for the court reporter.

23 **JUDGE KRAMER:** All right. Regarding Case Management Order
24 Number 5, I have two problems with it.

25 First, it refers to an Exhibit A, which is not attached to
26 the copy given to me. I'll need that. Don't come up yet.

27 Secondly, there's a mechanism whereby if there is a dispute
28 regarding getting any of the material from a hospital, that I am

1 to resolve it.

2 First, regarding the place where the hip gets taken out and
3 stored, throughout the order it's referred to the surgeon or the
4 hospital as being who you need help from. In the section where
5 you talk about I have jurisdiction to resolve disputes, you only
6 refer to the hospital. I would guess it could either be surgeon
7 or hospital so that should be consistent.

8 It appears in Paragraph F on Page 6.

9 Also -- go ahead.

10 **MR. TUCKER:** Your Honor, what I'd like to propose is that we
11 resubmit this because Paragraph F is not -- or should not be in
12 this order so I think that addresses -- we're aware of the
13 Court's concern in Paragraph F.

14 **JUDGE KRAMER:** The one I haven't stated yet?

15 **MR. TUCKER:** Well, the concern you expressed about the Court
16 resolving the disputes. And then the names of Mr. Kennedy --
17 this paragraph is in the MDL order, but it is not going to be in
18 the JCCP order.

19 **JUDGE KRAMER:** All right.

20 **MR. TUCKER:** So if you give us leave to take care of this
21 and then resubmit it to the Court.

22 **JUDGE KRAMER:** All right. Do you have in mind that if there
23 are disputes of any nature that somebody resolve it?

24 **MR. TUCKER:** Yes.

25 **JUDGE KRAMER:** Who?

26 **MR. TUCKER:** Well, what we have seen happen so far in the
27 MDL is that many of the lawyers that have clients, if they have
28 a client that's being operated on at a hospital in someplace,

1 and they're having difficulty with that hospital, the lawyer is
2 contacted and then they know to contact the leadership, and the
3 leadership on plaintiffs' side or leadership on the defense side
4 is then able to resolve this dispute.

5 We have not had to take a single issue to Judge Katz to
6 resolve. The lawyers have been able to resolve it with the
7 hospitals and the hospital lawyers.

8 **JUDGE KATZ:** As far as it's gone, Judge, is I was asked if I
9 would accept a call from a lawyer for a hospital. Once the
10 lawyer for the hospital is asked to call me, the dispute was
11 resolved.

12 **JUDGE KRAMER:** All right. Well, if that's the way you want
13 it, that's fine. An alternative would be to make this Court
14 available if the parties wish to. Otherwise you're going to
15 have to file a lawsuit because I would not have jurisdiction
16 over the hospital or a surgeon unless that person or entity is a
17 party.

18 So what you might do as an alternative, and what I was going
19 to suggest, is that you make it voluntary if the hospital or the
20 surgeon or anybody else involved wishes to come here and simply
21 have, assuming I'm still here, a motion practice or an informal
22 matter, that's great. Otherwise, I can't order anybody to do
23 anything.

24 **MR. TUCKER:** So what we have found so far, Judge, at least
25 in the MDL, is that the preservation order and the attached
26 protocol was distributed to hospitals and surgeons all over the
27 country. And once the hospitals and the surgeons had that order
28 in hand, I think that most plaintiffs' lawyers, and I'm speaking

1 for people that may have had different experiences, but we've
2 been able to work through most of these explant issues with the
3 surgeons and hospitals. With very few exceptions, have any
4 issues percolated up that we had to really talk through.

5 **JUDGE KRAMER:** Do whatever you want. I don't care. Just
6 understand, I don't have procedural due process over a
7 third-party hospital, surgeon, anybody else. So you can either
8 create it much like you do in a regular protective order where
9 the hospital would agree in advance, which isn't going to
10 happen; or, secondly, make it this Court available, if the
11 parties are willing to do so, and that's an economically
12 rational way of dealing with it. Third, do nothing.

13 But I can't sign this with exhibit --

14 **MR. TUCKER:** So --

15 **JUDGE KRAMER:** Let me finish my sentence, please.

16 I can't sign this with Section F in there. That's what I
17 was going to tell you.

18 **MR. TUCKER:** Section F shouldn't be in there.

19 **JUDGE KRAMER:** Well, then we're of like mind, but do
20 whatever you want. Just make sure it works.

21 **MR. TUCKER:** Okay.

22 **JUDGE KRAMER:** Okay?

23 **MR. TUCKER:** We'll get you a new copy of it, Judge.

24 **JUDGE KRAMER:** Second thing I was going to add is if you
25 decide you are going to have a joint 30(b)(6) type deposition
26 and that the state litigation lawyers can participate, it is my
27 strong recommendation that you stipulate to have Judge Katz
28 resolve any discovery disputes resulting from that deposition

1 for two reasons:

2 One, you need somebody, and there's only two choices.

3 Second, he has broader jurisdiction than I do, say, over a
4 witness that I might not have jurisdiction over.

5 So my suggestion is you simply stipulate that any discovery
6 disputes, even those that are within the -- somebody's making a
7 lot of noise on your speakerphone. Please stop doing that.

8 Thank you -- put that in your stipulation that Judge Katz is the
9 one who is to resolve those, and keep that in mind going
10 forward.

11 All right. Let me pick a date for the case management
12 conference. Off the record.

13 (Off-the-record discussion.)

14 **JUDGE KRAMER:** Back on the record. Tuesday, August 29. The
15 Gadolinium cases are here at 1:30.

16 Anybody not be able to make that, that is part of the JCCP
17 action that I have?

18 **MR. SEEGER:** I cannot, I'm sorry. I can being replaced. I'm
19 replaceable.

20 **MR. KELLY:** Your Honor, is the day before available, the
21 28th?

22 **JUDGE KRAMER:** I don't work on Sunday.

23 **MR. KELLY:** Well, I just want to show that I do.

24 **JUDGE KRAMER:** The answer is no.

25 **MR. KELLY:** Well, then the preceding Friday?

26 **JUDGE KRAMER:** No.

27 **MR. KELLY:** Well, then let's do the 29th.

28 **JUDGE KRAMER:** August 29 and come here at 2:00 o'clock. I

1 might be able to finish Gadolinium earlier, all right?

2 Is there anybody that has anything else about anything?

3 We're about to adjourn.

4 **JUDGE KATZ:** I wanted to congratulate Dan Robinson on his
5 recent engagement, and congratulate his parents, who now have,
6 you know, maybe see something in the future of some pleasure
7 from the expanding family.

8 (Whereupon, proceedings adjourned at 3:03 p.m.)

9 ---o0o---

1 State of California)
2 County of San Francisco)

3
4 REPORTER'S CERTIFICATE

5
6 I, Janet S. Pond, CSR No. 5292, Official Court Reporter for
7 the Superior Court of California, County of San Francisco, do
8 hereby certify:

9 That I was present at the time of the above proceedings;

10 That I took down in machine shorthand notes all proceedings
11 had and testimony given;

12 That I thereafter transcribed said shorthand notes with the
13 aid of a computer;

14 That the above and foregoing is a full, true, and correct
15 transcription of said shorthand notes, and a full, true and
16 correct transcript of all proceedings had and testimony taken;

17 That I am not a party to the action or related to a party
18 or counsel;

19 That I have no financial or other interest in the outcome
20 of the action.

21
22 Dated: August 1, 2011

23
24 *s/Janet S. Pond*

25 _____
26 Janet S. Pond, CSR No. 5292
27
28